

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 28, 32, and 52**

[FAR Case 94-762]

RIN 9000-AG35

**Federal Acquisition Regulation;
Subcontractor Payments**

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council is considering amending the Federal Acquisition Regulation (FAR) to implement Sections 2091 and 8105 of the Act which address subcontractor payments, requests for information, and bonds. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: Comments should be submitted on or before April 3, 1995 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4037, Washington, DC 20405.

Please cite FAR case 94-762 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. John S. Galbraith, Finance/Payment Team Leader, at (703) 697-6710, in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAR case 94-762.

SUPPLEMENTARY INFORMATION:**A. Background**

The Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act), provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of the Act's implementation include changes in the areas of Commercial Item Acquisition,

Simplified Acquisition Procedures, the Truth in Negotiations Act, and introduction of the Federal Acquisition Computer Network (FACNET). In order to promptly achieve the benefits of the provisions of the Act, the Government is issuing implementing regulations on an expedited basis. We believe prompt publication of proposed rules provides the public the opportunity to participate more fully in the process of developing regulations.

This notice announces FAR revisions developed under FAR case 94-762. The following sections of the Federal Acquisition Streamlining Act are implemented by this proposed rule:

Section 2091 of the Act changed section 806 subsection (c) of the Fiscal Years 1992 and 1993 Defense Authorization Act by striking the existing subsection (c) and inserting a new subsection (c). The stricken words had permitted the FAR Council to substitute FAR coverage for coverage otherwise required from the Secretary of Defense. The substituted words require the FAR Council to place in the FAR, for Government-wide applicability, the coverage required of the Secretary of Defense.

Additionally, Section 8105 of the Act changed section 806 of the Fiscal Years 1992 and 1993 Defense Authorization Act by striking the existing subsection (b) and inserting a new subsection (b). The stricken words dealt with deadlines for the implementation in regulations of the statutory requirements, and that coverage is not longer pertinent. The substituted language creates an exemption from the requirements of the statute for the acquisition of commercial items. Therefore, the clause prescription at FAR 28.106-4(b) has been revised to reflect this exemption.

The proposed rule is, except for minor adjustments, the same language which was previously in the Defense Federal Acquisition Regulation Supplement, at DFARS 228.106-4-70, 228.106-6, 232.970, and 252.228-7006.

It should be noted that Section 4104(b) of the Act concerning subcontractor payments under smaller construction contracts is being addressed in a separate case. This case, 94-762, addresses only the changes required by Sections 2091 and 8105. It should also be noted that the duplication of responsibilities for furnishing copies of bonds in 28.106-6(d)(3) and the clause in 52.228-00 is intentional. The statute assigns this responsibility to both the Government and contractor. Finally, the language in 32.112-1(c) concerning "administrative and other remedial action" deliberately does not go into detail as to what these

are. The specifics of these areas and especially the regulations and procedures are peculiar to each agency. The wording is derived from the underlying statute.

In addition to the changes proposed here, there are changes being proposed to FAR Part 32 by other cases. FAR Subpart 32.1 (which will include the proposed 32.112) will apply only to purchases of non-commercial items. This will give effect to the exclusion provided for in Section 8105 of the Act. Coverage concerning financing and payment for purchases of commercial items will be provided in its own Subpart 32.2. It should also be noted that purchases of construction are not commercial purchases under the FAR.

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the FAR Council is conducting a series of public meetings. However, the FAR Council has not scheduled a public meeting on this rule (FAR case 94-762) because of the clarity and non-controversial nature of the rule. If the public believes such a meeting is needed with respect to this rule, a letter requesting a public meeting and outlining the nature of the requested meeting shall be submitted to and received by the FAR Secretariat (see **ADDRESSES** caption) on or before March 6, 1995.

The FAR Council will consider such requests in determining whether a public meeting on this rule should be scheduled.

B. Regulatory Flexibility Act

The proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, although it is not possible to estimate the number of Federal contractors or subcontractors that will be affected. A previous DOD analysis estimated that, based on data available for Fiscal Year 1991, less than 20 percent of all, or a total of 1,100 small business construction contractors under DOD construction contracts would have been impacted. The requirement to provide a copy of the payment bond to prospective subcontractors and suppliers applies to all businesses that enter into a construction prime contract which is subject to the Miller Act (40 U.S.C. 270a-270d). An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and submitted to the Chief Counsel for Advocacy of the Small Business Administration. The IRFA states that it is impossible to accurately

estimate the number of small businesses that prospectively will hold Federal construction contracts subject to the Miller Act and subsequently, the number of prospective subcontractors or suppliers that will request a copy of the payment bond. However, a previous DOD analysis estimated that the previous DOD-only equivalent rule would have impacted less than 20 percent of all small businesses that would have held DOD construction contracts subject to the Miller Act.

A copy of the IRFA may be obtained from the FAR Secretariat at the address given under the ADDRESSES caption. Comments are invited. Comments from small entities concerning the affected FAR parts will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and should cite FAR Case 94-762 in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) is deemed to apply because the proposed rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement concerning Subcontractor Payments is being submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Public comments concerning this request will be invited through a subsequent **Federal Register** notice.

List of Subjects in 48 CFR Parts 28, 32, and 52

Government procurement.

Dated: January 27, 1995.

Capt. Barry L. Cohen, SC, USN,

Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Parts 28, 32, and 52 be amended as set forth below:—

1. The authority citation for 48 CFR Parts 28, 32, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 28—BONDS AND INSURANCE—

2. Section 28.106-4 is amended by designating the existing text as paragraph (a) and adding (b) to read as follows:

28.106-4 Contract clause.

* * * * *

(b) In accordance with Section 806(a)(2) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of the Federal Acquisition Streamlining

Act of 1994, Pub. L. 103-355, the contracting officer shall insert the clause at 52.228-00, Prospective Subcontractor Requests for Bonds, in solicitations and contracts with respect to which a payment bond will be furnished pursuant to the Miller Act (see 28.102-1), except for contracts for the acquisition of commercial items as defined in 48 CFR part 12.

3. Section 28.106-6 is amended by adding paragraph (d) to read as follows:

28.106-6 Furnishing information.

* * * * *

(d) Section 806(a)(2) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, requires that the Federal Government provide subcontractors information on payment bonds under contracts for other than commercial items as defined in 48 CFR part 12. Upon the written or oral request of a subcontractor/supplier, or prospective subcontractor/supplier, under a contract with respect to which a payment bond has been furnished pursuant to the Miller Act, the contracting officer shall promptly provide to the requester, either orally or in writing, as appropriate, any of the following:—

(1) Name and address of the surety or sureties on the payment bond.—

(2) Penal amount of the payment bond.—

(3) Copy of the payment bond. The contracting officer may impose reasonable fees to cover the cost of copying and providing a copy of the payment bond.

PART 32—CONTRACT FINANCING—

4. Sections 32.112, 32.112-1 and 32.112-2 are added to read as follows:

32.112 Payment of subcontractors under contracts for non-commercial items.

32.112-1 Subcontractor assertions of nonpayment.—

(a) In accordance with Pub. L. 102-190, title VIII, section 806(a)(4) as amended by Sections 2091 and 8105 of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, upon the assertion by a subcontractor or supplier of a Federal contractor that the subcontractor or supplier has not been paid in accordance with the payment terms of the subcontract, purchase order, or other agreement with the prime contractor, the contracting officer may determine—

(1) For a construction contract, whether the contractor has made—

(i) Progress payments to the subcontractor or supplier in compliance

with chapter 39 of title 31, United States Code (Prompt Payment Act);—

(ii) Final payment to the subcontractor of supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;—

(2) For a contract other than construction, whether the contractor has made progress payments, final payments, or other payments to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;—

(3) For any contract, whether the contractor's certification of payment of a subcontractor or supplier accompanying its payment request to the Government is accurate.—

(b) If, in making the determination in subparagraphs (a)(1) and (3) of this section, the contracting officer finds the prime contractor is not in compliance, the contracting officer may—

(1) Encourage the contractor to make timely payment to the subcontractor or supplier; or

(2) If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor.—

(c) If the contracting officer determines that a certification referred to in paragraph (a)(4) of this section is inaccurate in any material respect, the contracting officer shall initiate administrative or other remedial action.

32.112-2 Subcontractor requests for information.—

(a) In accordance with Pub. L. 102-190, title VIII, section 806(a)(1) as amended by Sections 2091 and 8105 of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, upon the request of a subcontractor or supplier under a Federal contract for a non-commercial purchase, the contracting officer shall promptly advise the subcontractor or supplier as to—

(1) Whether the prime contractor has submitted requests for progress payments or other payments under the contract to the Federal Government; and—

(2) Whether final payment under the contract has been made by the Federal Government to the prime contractor.—

(b) This subsection does not apply to matters that are—

(1) Specifically authorized under criteria established by an Executive order to be kept classified in the interest of national defense or foreign policy; and—

(2) Property classified pursuant to such Executive order (see 5 U.S.C. 552(b)(1)).

**PART 52—SOLICITATION PROVISIONS
AND CONTRACT CLAUSES—**

6. Section 52.228-00 is added to read as follows:

**52.228-00 Prospective Subcontractor
Requests for Bonds.—**

As prescribed in 28.106-4, use the following clause:

**PROSPECTIVE SUBCONTRACTOR
REQUESTS FOR BONDS (DATE)—**

In accordance with section 806(a)(3) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of this contract for which a payment bond has been

furnished to the Government pursuant to the Miller Act, the Contractor shall promptly provide a copy of such payment bond to the requester.

(End of clause)

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